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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 940

STEPHEN J. OLAH,
Petitioner,

v.

GARVIS L. SAMS, ALBERT SIDNEY PARKER, FRANK D. HOLCOMB, INDIVIDUALLY AND AS MEMBERS OF THE GRIEVANCE TRIBUNAL OF THE STATE DISCIPLINARY BOARD OF THE STATE BAR OF GEORGIA, IN DOCKET NO. 37; CLINTON J. MORGAN, THE DISTRICT REPRESENTATIVE OF THE STATE DISCIPLINARY BOARD, ASA W. CANDLER, CHAIRMAN OF SAID BOARD, AND THE STATE BAR OF GEORGIA,
Respondents.

REPLY BRIEF TO RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED

Since Respondents seek to re-state the question, we seek to do so for brevity by further shortening it to:

DOES THE SYSTEM OF GOVERNMENT IN GEORGIA UNDER ITS EXISTING CONSTITUTION AUTHORIZE EITHER THE LEGISLATIVE BRANCH (BY TRANSFER AND ABROGATION OF ITS DUTIES) AND/OR THE JUDICIARY TO ASSUME THE POWER OVER LAWYERS AS HAS BEEN DONE?

Unified, incorporated or integrated bars have been created in some 30-odd states and territories; but in each instance broad powers and jurisdiction were granted, BY THE PEOPLE, either to the Legislative Branch, or to the Judiciary. Unlike these states and territories, *the Georgia Supreme Court does not have a general superintending power over all inferior courts, but under its extremely limited power as an appellate court it was without authority to legislate into existence the entity—State Bar.*

STATEMENTS UNTRUE IN RESPONDENT'S STATEMENT OF CASE

Counsel unequivocally show aspects (1) and (2) of the case as stated in respondent's brief to be untrue. Aspect (3) is of no importance whatever.

(1) The State Bar is an autonomous body, within its illegal charter as approved and written by the Supreme Court of Georgia by the law here attacked, which that Court refused twice to declare unconstitutional, choosing instead to claim plenipotentiary power to create this corporation by "inherent power", with alleged constitutional power flowing from the people by reason of being named "*FIRST*" in the list of courts in which "the judicial powers" of Georgia vest (Ga. Code Ann. § 2-3601.) Without doubt the State Bar is a self-governing body. But it does not here matter since the petitioner attacked the

creation to be absolutely null and void under the State and Federal Constitutions.

(2) The State Bar of Georgia does conduct its hearings, pronounce disciplinary sanctions, and its results as an autonomous body, and DOES NOT as respondent's brief implies, "by making recommendations and report to the courts." It is true that if the culprit elects to have a jury determination of questions of fact, these are heard by a jury.

(3) The oligarchal nature of this alleged democratic body is such that it would be a waste of time for any member to attack the expenditures of this organization. However, since under the ruling made, a trial will be had thereon, and THIS ISSUE IS NOT BEFORE THIS HONORABLE COURT. But unless we obtain a reversal of the Constitutional attacks, the rulings below will become the law of the case and the law of the land, and we cannot obtain a review thereafter, but will be bound thereby.

REBUTTAL ARGUMENT

Both *Clary v. Matthews*, 224 Ga. 82 (160 S.E.2d 338) and *Wilson v. State Bar*, 225 Ga. 343 (168 S.E.2d 584) involved specific rules and not the power, authority and jurisdiction of the Court to make the rules as in the instant case. While *Wallace v. Wallace*, 225 Ga. 102 (166 S.E. 2d 718) was a ruling against us in the Georgia Supreme Court, the consideration given this case by the Supreme Court of the United States (Certiorari denied 38 U.S.L. Week 3192, Nov. 24, 1969, No. 117, October Term 1968-69) involved merely a question of notice, and to rule otherwise would have required this Court to look for error not designated in the petition.

Lathrope v. Donohue, 367 U.S. 820 (1961) does not involve all of the constitutional attacks as were raised in the instant case, for in Wisconsin, the Supreme Court did not release an autonomous, oligarchal body upon the lawyers, but reserved control over discipline and disbarment unto itself as a Court matter. In Georgia the statute, rules and charter, in plain and unmistakable language, take control completely away from the Courts and place it in the illegal autonomous body known as State Bar of Georgia.

Petitioner will not make an extended argument here but insists on his rights under each of these constitutional provisions which have been stated in the petition. His right to the courts is protected by Ga. Code § 2-104; his right to benefit of counsel is protected by Ga. Code § 2-105; and his right to due process is protected by Ga. Code § 2-103; and his right to property—practicing law being a property right—is protected under Ga. Code § 2-301, and such property right shall not be taken from him unless adequate compensation is first paid; but if these are taken from him by the State Courts under the authority of null and void statutes or by judicial fiat, disguised as "inherent power", his rights as a citizen under the Federal Constitution have been violated.

Again, if Georgia fails in its Constitution to give its court of last resort the power to do what it did here, each and every right guaranteed to a citizen of the United States —in this case a lawyer—are violated as well.

The Fifth and Fourteenth Amendments extend to the protection of lawyers. See *Spevack v. Klein*, 385 U.S. 511. Note also that in this case, *Cohen v. Hurley*, 366 U.S. 117, was overruled.

Here, in the case sub judice, where the State law is unconstitutional, and, in fact, the Georgia Court of last resort, by its silence, confirms this, and claims inherent power to create this entity; and the Constitution of Georgia shows it is a court with extremely limited jurisdiction, there is no authority for the creation of the entity; and the acts of the Supreme Court of Georgia are void in violation of the Federal Constitution.

Lawyers also enjoy first class citizenship.

> *Slowchower v. Bd. of Education*, 350 U.S. 551; *Garrity v. New Jersey*, 385 U.S. 493.

Any restriction upon the practice of law must be valid.

> *Hackin v. Lockwood*, 361 F.2d 499; cert. denied 385 U.S. 960.

Inherent power of the Courts is like that of the legislative branch — "broad, but it is not unlimited." *Watkins v. U. S.*, 354 U.S. 178, 187.

Freedom to associate or not associate is an inseparable aspect of liberty, assured by the Due Process Clause of the Fourteenth Amendment. *N.A.A.C.P. v. Patterson*, 357 U.S. 449.

This is not a purely political question; or one over which the State Courts shall rule supreme, but is, indeed, one involving the rights of the individual, violated, by reason of the lack of constitutional authority to control him. *Pacific Telephone Co. v. Oregon*, 223 U.S. 118.

Since Congress cannot abdicate and transfer to others essential legislative functions with which it is vested, neither can the General Assembly of Georgia do so. *Schecter Corp. v. U. S.*, 295 U.S. 495.

A state law or ordinance violating the right of free speech guaranteed by the First Amendment is made applicable to the States by the Fourteenth Amendment. *Terminiello v. Chicago*, 337 U.S. 1; *Speiser v. Randall*, 357 U.S. 513.

A state law or state action must conform to the Federal Constitution's protection of individuals, and if same violates the due process clause of the Fourteenth Amendment, it is the duty of this Court to strike it down. *Board of Education v. Barnette*, 319 U.S. 624; *Wieman v. Updergraff*, 344 U.S. 183.

Although there may be a legal presumption supporting State legislation, nevertheless, the preferred place given our indispensable democratic freedoms requires this Court to take jurisdiction and grant the writ of certiorari. State regulation must not infringe constitutional rights. *Thomas v. Collins*, 323 U.S. 516.

Under Oregon law, its court of last resort may have exclusive jurisdiction under its common law and statutory powers to control the practice of law—but with the adoption of the common law in Georgia THERE WAS NO SUPREME COURT, WHICH WAS CREATED THEREAFTER. See *Lenske v. Oregon*, 384 U.S. 943; *Lenske v. Sercombe*, 266 F. Supp. 609.

Of course, without any doubt, our Supreme Court does possess some inherent power just as other courts do. And indeed the Legislature does possess so-called right to confer through legislation, judicial power on newly created established courts as authorized by the Constitution (city courts, civil and criminal courts, etc.). Certainly all courts possess inherent power—THE VERY WORD "COURT" IMPLIES SUCH POWER FROM THE

SOVEREIGN—BUT THE SOVEREIGN CONTROLS THAT POWER—AND THE PEOPLE OF GEORGIA ARE THE SOVEREIGN IN THIS WONDERFUL STATE—

—NOT THE COURTS—
—NOT THE LEGISLATURE—
—NOT THE EXECUTIVE BRANCH—

Why is there a great desire of this State Bar hierarchy to pass the proposed JUDICIAL ARTICLE?

(Note: Judicial article pertains to constitutional amendment giving wide powers to Supreme Court to control entire judicial system in Georgia).

ONE PURPOSE—to legalize, for the first time, everything that this organization has done since its illegal birth.

The western states particularly, and many of the others which have adopted the integrated, incorporated bar ALL HAVE SWEEPING CONSTITUTIONAL POWER GIVEN TO THE SUPREME COURT AS—"constitutionally conferred judicial power."

Of course, some, through judicial fiat, may have overstepped the bounds of power and jurisdiction in taking powers thereunder. Ours is a government of law, not of men—but men make up all branches of this great government—including the Judiciary. Yes, it takes the courage of big men to admit being wrong. Counsel was unable to convince the lower court of its error.

Again, let us look at the so-called "constitutionally conferred judicial power", and particularly such power as expressed in the Constitutions of the many Supreme Courts, or courts of last resort, which have assumed control of and the right to control or create integrated or incorporated bars.

STATE	CONSTITUTION
Wisconsin	—"general superintending power over all inferior courts."
Montana	
Florida	—"vested with all the power and authority necessary to carry out its rules..."
Hawaii	—"power to promulgate rules and regulations ... for all courts relating to process, practice, and appeals, which shall have the force and effect of law."
Kentucky	—"general control of inferior jurisdictions."
Idaho	—"no power in Legislature to deprive the judicial department of power or jurisdiction."
Louisiana	—"general supervision over all inferior courts."
Michigan	—"One court of justice" "Supreme Court shall have general superintending control over all courts ... every power except to remove a judge."
Missouri	—"general superintending control ... Supreme Court establishes rules of practice and procedure in all courts ... assignment of judges, etc."

Nebraska	—"power to control lower courts..."
North Carolina	—"general supervision over the proceedings of the inferior courts."
Oklahoma	—"original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts..."
South Dakota	—"shall have a general superintending control over all inferior courts."
Washington	
West Virginia	
Nevada	
Alabama	
California	
Hawaii	—"original jurisdiction"
Idaho	
Kansas	
Louisiana	or
Indiana	
Massachusetts	
Minnesota	"some original jurisdiction"
North Carolina	
New Mexico	

Oklahoma

Pennsylvania

North Dakota

Connecticut —"powers and jurisdiction of its courts shall be defined by law."

Georgia —"*court for the correction of errors of law alone—no original jurisdiction.*"

GEORGIA (PROPOSED CONSTITUTIONAL AMENDMENT)

"The Supreme Court shall have power to prescribe rules governing practice and procedure for the judicial system ... govern admission to the bar, organization of the bar, standards ... etc. ..."

Of course, if the Judicial Article is ever passed by the General Assembly and adopted by the People, there is no doubt of the power in the Supreme Court to create the State Bar. WILL THE PEOPLE EVER ADOPT THE PROPOSED AMENDMENT?

Usurpation of power is tyranny of the first order. Why not wait until the People grant such power to our court of last resort, and not assume the power out of thin air?

There simply is complete absence of "constitutionally conferred judicial power" in the Georgia Supreme Court to control the bar of other constitutional courts such as the Court of Appeals and the Superior Courts. Constitution of 1943; Code Ann. § 2-3601.

Respondents claim that the State Bar was created under the inherent power of the court or rather a joint venture of the General Assembly and the Court. State Bar con-

tinues to argue this strenuously. We show that even though courts have certain inherent powers, it does not amount to power to control other courts, and to control the entire legal profession from top to bottom. At the outset we recognize that each separate court has inherent power to control its own court and to regulate the lawyers practicing before that court. However, the question is: "Does the Georgia court system give its court of last resort (now the Supreme Court) control over all others whereby it may regulate the entire judicial system?"

The history of the Georgia Judicial system clearly shows that for the first 70 years from Colonial to Statehood to 1845 THERE WAS NO SUPREME COURT IN GEORGIA. In fact, from 1835 to 1845, even though the Constitution authorized one, the PEOPLE through its General Assembly refused to breathe life into the Supreme Court. (Constitution of 1777; Constitution of 1789; Constitution of 1798, amended 1834-1835 to create a Supreme Court). Legislation thereafter breathed life into it in 1845, some 10 years later. This constitutional amendment expressly stated that it was for the correction of errors of law only WITH NO ORIGINAL JURISDICTION. THIS HAS BEEN REPEATED IN EVERY CONSTITUTION ADOPTED SINCE THAT TIME.

Thus it is clear our Supreme Court's origin did not follow that of the Supreme Court of the United States; and our Judiciary did not rise up out of the people as that court did as titular head of the Federal Judiciary at the very outset; as head of the Judiciary with a Chief Justice of the United States as its leader. The people of Georgia were leary of the United States Supreme Court from the very beginning because of the Indian Question, and thus did not favor the creation of such a court in this State.

Later, in the amendment to the Constitution of 1877 in 1906 the Court of Appeals was created—NOT SUBSERVIENT TO THE SUPREME COURT BUT TAKING PART OF THE SUBJECT MATTER FROM THE SUPREME COURT. No certiorari was allowed although it could certify constitutional questions. Only after a clerk conceived the idea of receiving fees by certiorari was a constitutional amendment passed authorizing and making the Court of Appeals subservient to our Supreme Court, as it exists today in the Constitution of 1945. (See McElreath on Georgia Constitutions)

Thus the People of this State have never given any absolute power of control to the Supreme Court to control the Judiciary in this State. Else, why attempt a constitutional amendment to obtain same as is found in the New Proposed Judicial Article for Georgia, now under consideration in the Georgia General Assembly? House Resolution on this question is as follows:

> "The Supreme Court shall have the power to prescribe rules governing practice and procedure for the judicial system. The Supreme Court shall by rule govern admission to the bar, organization of the bar, standards of professional conduct and the discipline of members of the bar."

If it already had this all-powerful inherent power then why ask the People to assure it? Or rather, if it grabs the power at this time, then it does so by Judicial Fiat, so abhorred by all.

With pride we state that heretofore the Supreme Court of Georgia has never assumed any authority over the Superior Courts or the Court of Appeals which was not spelled out in no uncertain terms in the Constitution by the People of Georgia.

How has disbarment been handled? By the courts separately. In Superior courts by trial—in the Court of Appeals under its own inherent power—in the Supreme Court under its own inherent power. How has contempt been punished? In the Superior Court; in the Court of Appeals; and in the Supreme Court—each separately and controlling its own destiny through its own inherent power.

When the Supreme Court of Georgia came into existence in 1845 (Acts 1845, Cobb, 448; Acts 1884-5, p. 45; Acts 1935, p. 161, 162) its powers were defined by statutes of the General Assembly, and with the utmost complaisance the Supreme Court from that time forward accepted same, including the limitations on its power, saying "nary a word" by way of objection. These limitations were implicit in the following statutes:

Code § 24-3901. The Supreme Court has authority—

1. To exercise appellate jurisdiction, *and that only*, and in no case to hear facts or examine witnesses.

5. To establish, amend, and alter *its own rules of practice*, and to regulate the admission of attorneys.

7. To exercise such other powers, not contrary to the Constitution, as are or may be *given it by law*.

Why didn't the Supreme Court indignantly rub out rule 5, and proclaim that it had the right to establish *all rules of practice*, and not just *its own rules of practice*&

And in 1896 the General Assembly enacted another statute (Ga. L. 1896, pp. 42, 44) bristling with limitations as to the powers of the Supreme Court, as follows, to-wit:

"Code § 24-4016. The Court shall have full power and authority to make all such rules, *not in conflict with the Constitution or laws*, as may be necessary for carrying the Constitution into effect and regulating *its* proceedings thereunder. To these ends it may, by such rules, provide and declare when the Court shall sit 'in a body' and when in separate divisions, how *its* minutes shall be kept, how the cases upon *its* dockets shall be apportioned and divided between the two divisions; at what time and to what extent changes shall be made in the personnel thereof, and generally may *make all such regulations as to practice and procedure which experience may show to be convenient and expedient for the proper transaction of its business*, with due regard to the rights of parties and counsel concerned." (Emphasis added)

What Court were these matters to affect? Were all of the courts to be affected? No indeed! ONLY THE SUPREME COURT and its business was affected thereby. And note that said powers might be exercised only "when not in conflict with the Constitution *or laws*."

If the Supreme Court has had inherent power all of the while to regulate all lawyers, and "supervise the practice of law generally", why did it remain silent so long with these statutes on the statute-books? How is it that in 1896 the General Assembly and the Supreme Court of that era did not know about this "inherent power" so recently located and declared by the Supreme Court?

See *Ward v. Big Apple Super Markets*, 223 Ga. 756, at 764:

"Before and since the adoption of the 1945 Constitution this court has deliberately and consistently required a unanimous decision to overrule a unanimous decision.

See Cody v. Cody, 221 Ga. 677; Hood v. First Nat. Bank, 219 Ga. 283; Rivers v. Cole Corp., 209 Ga. 406. Indeed, by concurrence of seven justices, whereas Code §6-1611 requires only six, we demonstrate that we do not recognize it. This Court since its creation in 1845 has considered itself bound by its unanimous decisions and will respect and follow such decisions, overruling them only by a unanimous court which can be done without legislative authority."

The People, the lawyers, and this petitioner are interested in:

"maintaining high standards of conduct in the legal profession;"

"aiding in the efficient administration of justice;"

"to foster among the members of the Bar of this State the principles of duty and service to the public;"

"to improve the administration of justice;" and

"to advance the science of law."

But it is petitioner's firm belief that this be done by constitutionally authorized legislation, and not by court legislation by judicial fiat.

CONCLUSION

Of necessity, if there exists no authority of law in Georgia authorizing the Georgia Supreme Court to do what it did—the Constitutional rights guaranteed to the petitioner by the United States Constitution have been violated.

Respectfully submitted,

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